IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

In re:	)	
	)	
HERSCHEL HANCOCK,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 97-CV4189-JLF
	)	
MICHELLE VIEIRA,	)	Adv. No. 97-4000
	)	
Appellee.	)	

MEMORANDUM AND ORDER

FOREMAN, District Judge:

Before the Court is a *pro se* appeal by Herschel Hancock ("Appellant") of various orders entered by the United States Bankruptcy Court for the Southern District of Illinois, Kenneth J. Meyers, J. Specifically, Appellant requests that the Court reverse: (1) the order entered on October 24, 1996, granting the Trustee's motion to turn over all of Appellant's property; (2) the order entered on November 19, 1996, overruling objections made to the Trustee's proposed sale of Appellant's personal property; and (3) the order entered on May 6, 1997, denying Appellant's discharge of debt and authorizing the continued administration of his estate by the Trustee. The orders under appeal are final. Accordingly, the Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a)(1) (1997). For the reasons set forth herein the Court **AFFIRMS** the judgment of the bankruptcy court.

BACKGROUND

Appellant filed a voluntary Chapter 7 bankruptcy petition, Case No. 9640675, on June 13, 1996. On October 24, 1996, the bankruptcy court ordered that all of his property be turned over to the Trustee. Appellant and his wife, Candace, subsequently filed objections to the proposed sale of various items of personal property designated by the Trustee for liquidation. They claimed that certain items designated to be sold were the property of Candace or other third persons who were not parties to the Chapter 7 proceedings. On November 19, 1996, the bankruptcy court held a hearing on the

Hancocks' objections and found that the objections were unsubstantiated. Neither of the Hancocks were present at the hearing.[1]

On January 8, 1997, the Trustee filed a complaint pursuant to 11 U.S.C. § 727 and Bankruptcy Rule 7001(4) seeking to deny Appellant's discharge. (Case No. 97-4000). The Trustee alleged that Appellant had transferred, removed, destroyed, and concealed property of the estate subsequent to the filing of his Chapter 7 petition. She further alleged that Appellant knowingly and fraudulently made a false oath on his bankruptcy schedules by failing to schedule numerous items of personal property, that he knowingly and fraudulently failed to cooperate with her in the orderly administration of the estate, and that he repeatedly refused to obey the orders of the bankruptcy court pertaining to the turnover of personal property for liquidation.

Appellant filed his answer to the complaint on January 27, 1997, and made a jury demand therein. The bankruptcy court denied his jury demand and ordered it stricken from the record. He then filed an objection to the Trustee's § 727 complaint, alleging that it was untimely. Appellant also objected to the bankruptcy court's order setting a hearing date on the complaint for March 25, 1997. His objection was not based on the date itself, but instead, was based on his belief that the bankruptcy court was without subject matter jurisdiction to preside over the adversarial proceedings initiated by the Trustee. Additionally, Appellant renewed his demand for a jury trial. The bankruptcy court held a hearing on Appellant's objections, but Appellant inexplicably failed to appear. The court orally ordered that Appellant's objection to the order setting hearing date was overruled and noted that the court had already addressed Appellant's jury demand and denied it.

The hearing on the § 727 complaint to deny discharge was held on March 25, 1997. The Trustee appeared in person to prosecute her complaint. Appellant, however, failed to appear before the bankruptcy court and was, accordingly, found in default. The proceeding continued without Appellant. Three witnesses, to include the Trustee, testified at the hearing concerning the allegations made by the

[1]The Court notes that Mrs. Hancock was not present at the hearing due to a severe head and brain injury she had sustained in August, 1996, which required neurosurgery and a prolonged hospitalization.

Trustee in the § 727 complaint. Based on this testimony, the bankruptcy court found that a person by the name of Robert Toenyes, at the request of Appellant, removed property of the estate from Appellant's Harrisburg, Illinois, residence. The removal of property occurred subsequent to the court's order authorizing the turnover of Appellant's property to the Trustee. The court further found that certain property it had ordered to be turned over to the Trustee was not scheduled in Appellant's bankruptcy petition and schedules. Specifically, the court found that the 1992 Cadillac Sedan DeVille and the 1987 Jaguar, which were property of the estate, were not scheduled. The court additionally found that Appellant willfully removed the Cadillac from the State of Illinois and concealed it from the Trustee until it was eventually returned after several demands were made by the Trustee.

In sum, the bankruptcy court found that, as alleged in the Trustee's complaint, Appellant knowingly and willfully violated 11 U.S.C. §§ 727(a)(2)(B), 727 (a)(4)(A), and 727(a)(6)(A), in that he: (1) with the intent to hinder, delay, or defraud his creditors, removed and attempted to conceal property of the estate after filing his bankruptcy petition; (2) knowingly and fraudulently made a false oath on his bankruptcy schedules by omitting property of the estate; and (3) he refused to obey the bankruptcy court's order concerning the turnover of the property of the estate.

The bankruptcy court entered judgment against Appellant on May 9, 1997, denying his discharge. Notice of appeal was filed on June 17, 1997. Both parties have presented the facts and legal arguments in their respective briefs, and neither party has requested oral arguments. Because the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument, the Court finds that oral argument is unnecessary. *See* Bankruptcy R. 8012.

DISCUSSION

Appellant has raised a multitude of issues in his brief. Under the heading "Statement of Issues Presented," Appellant sets forth twenty-one issues, excluding sub-issues, and under the heading "Questions to be Appealed," he sets forth four more issues. Appellant's request for relief, however, clarifies the main issues he raises before this Court: (1) Whether the bankruptcy court erred in ordering that all of Appellant's

property be turned over to the Trustee for liquidation; (2) Whether the bankruptcy court erred in overruling Appellant's objections to the sale of various items of personal property; and (3) Whether the bankruptcy court erred in denying Appellant's discharge. *See* Appellant's Br. at 21. Each of the twenty-four issues he raises in his brief falls within one of these main issues.

The Court first addresses the issues Appellant raises concerning the proceedings leading up to and including the sale of the estate's property. In her brief, the Trustee argues that only those issues that arose out of the May 6, 1997, order denying discharge are before this Court, *see* Appellee's Br. at 2, and she is correct. Orders approving or failing to approve the sale of a debtor's

property are considered final decisions and are immediately appealable. *In re Sax*, 796 F.2d 994, 996 (7th Cir. 1986). Title 11, United States Code, Section 363(b)(1) provides, "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." Section 363(m) further provides, "The reversal or modification on appeal of an authorization under subsections (b) or (c) ... of a sale ... of property does not affect the validity of a sale ... *unless such sale ... [was] stayed pending appeal."* (emphasis added). The requisites of notice and a hearing were met in this case. The Trustee provided notice of her intent to sell on October 23, 1996. The bankruptcy court entered an order on October 24, 1996, turning over to the Trustee all personal property for sale. The bankruptcy court, in response to objections filed by Appellant and Candace, held a hearing on November 19, 1996, and overruled their objections to the sale of various items of personal property located at their Harrisburg, Illinois, residence. Appellant never obtained a stay pending appeal, and the sale of Appellant's property soon followed.

It is too late for Appellant to now challenge the proceedings leading up to and including the sale of the estate's property. In his Reply Brief, Appellant asserts:

> When an Appellant seeks to reverse the Bankruptcy Court's authorization of the sale of property, Trustee, or Counsel for Trustee, the pleads [11 U.S.C.] § 363(m), asking that the appeal be denied because the property can never be reclaimed. What a preposterous perversion of justice? Is it really the intent of our judicial system while, operating under Color of Law, to permit injustice to abound, running rampant?

Appellant's Reply Br. at 6. Interestingly, the Trustee, in her brief never makes explicit reference to § 363(m), which means that appellant, despite proceeding *pro se*, was well aware of the bankruptcy law pertaining to the finality of a sale if a stay was not obtained. This, in turn, begs the question: Since Appellant was well aware of § 363(m) and its impact on his challenge to the sale of the estate's property, why then is he challenging the bankruptcy court's orders pertaining to the sale of the property before this Court?

The Court hesitates to respond to Appellant's rhetorical question of whether it is really the intent of the judicial system to "permit injustice to abound" by applying Congress's explicit mandate in § 363(m). Nevertheless, the Court wants to make it abundantly clear that it is the application of § 363(m) in this case that ensures the greatest amount of justice is provided to Appellant's creditors. As cogently explained by

the Seventh Circuit in *In re Sax:*

> The immediate appealability of decisions determining the validity of a sale *works to the benefit of the debtor's estate and creditors.* If purchasers at a trustee's sale of a debtor's property had to wait until after the entire proceedings were finished to have their property rights determined, *undoubtedly a debtor's property would be worth less than it is under current law.*

796 F.2d at 997 (emphasis added). Appellant, dissatisfied with *his* failure to obtain a stay pending appeal, is simply asking this Court to disregard Congress's explicit mandate in § 363(m). To say the least, he is wasting his time. Accordingly, the questions raised by Appellant of whether the bankruptcy court erred in ordering that Appellant's property be turned over to the Trustee and whether the bankruptcy court erred in overruling Appellant's and Candace's objections to the sale of the property are moot. *See In re Sax*, 796 F.2d at 997; *In re Vetter*, 724 F.2d 52, 55-56 (7th Cir. 1983) (failure to obtain a stay pending appeal renders the appeal moot).

The remaining issues raised on appeal by Appellant fare no better. They concern the bankruptcy court's denial of discharge pursuant to 11 U.S.C. § 727(a). Although Appellant raises multiple issues concerning the denial of discharge, the issues he raises can be accurately condensed to two main issues: (1) Whether the Trustee timely filed her § 727 complaint to deny discharge; and (2) Whether the bankruptcy judge erred in denying Appellant's discharge.

The Trustee's complaint was undoubtedly timely filed, and Appellant all but concedes this issue in his Reply Brief. Appellant states:

> The Bankruptcy Court issued an Order, dated October 24, 1996, granting an extension of time pursuant to Motion to Extend 727 Deadline, referred to by Appellee. . . . Presuming the request for extension were filed by Appellee, in Person, on October 8, 1996, it seems somewhat suspicious to Appellant that it would have taken the Bankruptcy Court SIXTEEN (16) DAYS to act upon the request and issue its order. *If, in fact, such did happen, the Appellant sincerely apologizes to Appellee and to this Court, and withdraws his complaint that Appellee's Motion to Deny Discharge was not timely filed.*

Appellant's Reply Br., ¶ 3 at 3. The Trustee did, in fact, file for an extension of time on October 8, 1996, to file her § 727 complaint. Although Appellant alleges that he never received a copy of the motion, he has failed to rebut the presumption that he did, in fact, receive it because it was accompanied with a certificate

of service. Appellant did not file any objections to the motion. On October 24, 1996, the bankruptcy court granted said motion and extended the filing date for the § 727 complaint to January 8, 1997.[2] On January 8, 1997, the Trustee filed her § 727 complaint with the bankruptcy clerk. Hence, the complaint was timely filed.

The remaining issue is whether the bankruptcy court erred in denying Appellant's discharge. This Court's review of the bankruptcy court's denial of discharge is governed by two separate standards of review. The Court reviews the determination of facts by the bankruptcy court for clear error. *In re Andreuccetti,* 975 F.2d 413, 419-20 (7th Cir. 1992). A "finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985) (internal quotation marks and citation omitted). The bankruptcy court's conclusions as to the legal effect of findings of fact, however, are reviewed *de novo*. *In re Campbell,* 984 F.2d 775, 779 (7th Cir. 1993). Neither the bankruptcy court's findings of fact nor its application of the facts to the law are in error.

After reviewing the March 25, 1997, hearing transcript and the corresponding order entered on May 6, 1997, the Court is not left with a definite and firm conviction that the bankruptcy court made a mistake regarding its findings of fact. In fact, it is left with a definite and firm conviction that its findings of fact were correct. First, none of the evidence adduced at the hearing was rebutted by Appellant. Why? Because he failed to appear. Second, all of the evidence proffered at the hearing showed that Appellant acted fraudulently, attempted to hinder the proceedings, and continuously refused to obey lawful court orders. At the hearing, Robert Toenyes testified that Appellant gave him a handwritten note requesting him to remove property from the Appellant's Harrisburg, Illinois, residence. (Discharge Tr. at 6). Appellant gave this note to Mr. Toenyes subsequent to the bankruptcy court's order to turn over the property to the Trustee for sale. (Id.). The note stated:

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[2]The Court fails to appreciate the significance of Appellant's argument that the sixteen day turnaround on the bankruptcy court's order is somehow "suspicious" given the fact that the local rules provides that "[r]ulings on all motions will be issued within forty-five (45) days after the due date of any answering brief. . . ." Local R. 5(e) (1995).

To Whom It May Concern:

> Robert Toenyes has permission and is authorized to be on 1501 Barnett Street [Appellant's residence at the time] to remove personal property and files.

/S/ Herschel Hancock.

(Id.). Mr. Toenyes further testified that under this alleged authority, he removed and stored property for Appellant until he, Mr. Toenyes, discovered that those acts were illegal. (Id. at 6).

The uncontradicted proffer made by the Trustee further demonstrated that subsequent to the bankruptcy's order to turn over the property for liquidation, Appellant's Cadillac Sedan DeVille was not at the Harrisburg residence when the Trustee arrived for her inventory and inspection. (Discharge Tr. at 7-8). Appellant's then counsel informed the Trustee that Appellant had taken the Cadillac to the State of Texas. *(Id.* at 8). Appellant was ordered by the bankruptcy court to notify the Trustee by 4:00 p.m. on October 24, 1996, concerning the location of the car, but he failed to do so. *(Id.)*. Only after Appellant's counsel notified Appellant did he bring the car back to the State of Illinois. (Id.). The Trustee further proffered that on several occasions she tried to schedule an inspection and inventory of the Harrisburg, Illinois, residence. (Id. at 9). Appellant failed to cooperate, and threatened to "blow [her] head off" if she came to the residence to inventory and inspect it.

Lastly, the bankruptcy court took judicial notice of, *inter alia*, the bankruptcy petition and schedules filed by Appellant in these proceedings. (Id. at 2-3; Case No. 97-4000, Doc. 18 at 2). Neither the Cadillac Sedan DeVille nor the Jaguar at issue were scheduled by Appellant as his personal property in his petition. Yet the evidence adduced at the discharge hearing and throughout the entire bankruptcy proceeding clearly shows that both vehicles were, in fact, Appellant's personal property.

In short, this Court not only holds that the bankruptcy court's findings of fact were not in clear error, but agrees entirely with its findings. Appellant naturally disagrees with the evidence proffered at the discharge hearing because it was adverse to him. His problem is, and it is a big one, that he failed to appear and attempt to contradict any of the proffered testimony. The appellate process is the wrong stage of these proceedings to attempt to relitigate the facts.

Furthermore, based on the uncontradicted evidence, this Court holds that the bankruptcy court's application of its findings of fact was correct. Had it not denied discharge pursuant to § 727(a) based on this uncontradicted evidence, it would have been in error. Only one of the ten criteria set forth in § 727(a) must be met to deny the debtor's discharge. *See* § 727(a) (written in the disjunctive). Nevertheless, at least three of the subsections were met in this case. Section 727(a)(2)(B) provides that discharge should be denied if the debtor, with intent to hinder, delay or defraud his creditors, removed or attempted to conceal property of the estate after filing his bankruptcy petition. The letter to Mr. Toenyes and the removal of the Cadillac to the State of Texas show that Appellant did exactly what § 727(a)(2)(B) proscribes. Section 727(a)(4)(A) further proscribes the making of a false oath or account which, in turn, proscribes the omission of property on bankruptcy schedules which the debtor knows to be property of the estate. The omission of the Cadillac Sedan DeVille and the Jaguar by Appellant was clearly in violation of this provision, as well. Lastly, § 727(a)(6)(A) requires the debtor to obey the lawful orders of the bankruptcy court. By failing to turn over the Cadillac Sedan DeVille and by failing to fully cooperate with the Trustee after the bankruptcy court had ordered that the estate's property be turned over is clearly in violation of this provision.

The last matter the Court addresses is the Trustee's request for sanctions on the grounds that Appellant's appeal is frivolous. *See* Appellee's Br. at 6. The general rule is that a court should decline to impose sanctions unless there is some evidence that the appeal was taken in bad faith. *See Depoister v. Mary M. Holloway Foundation*, 36 F.3d 582, 588 (7th Cir. 1994). In the instant case, Appellant's arguments are undoubtedly weak. Nevertheless, the Court is not convinced that the appeal was taken in bad faith. The *pro se* Appellant is not an attorney and thus may not have been fully informed of the correct legal standards. *Cf. Rennie v. Dalton*, 3 F.3d 1100, 1111 (7th Cir. 1993) (sanctions imposed because appellate counsel should have known proper legal standard), *cert. denied*, 510 U.S. 1111 (1994). The Court, therefore, declines to impose sanctions against Appellant.

Appellant, however, should not read the Court's denial of sanctions as an implicit statement that his appeal has merit. The Court does not reach the question of frivolity in light of its determination that there

is no evidence of bad faith. In light of the Court's opinion, Appellant should fully evaluate the merits of his claim before pursuing an appeal to the Seventh Circuit. If the Seventh Circuit were to determine that such an appeal were frivolous in the legal sense, that determination could result in sanctions by the court. *See* Fed. R. App. P. 38.

CONCLUSION

For the above stated reasons, the judgment of the Bankruptcy Court for the Southern District of Illinois is **AFFIRMED.**

IT IS SO ORDERED.

DATED: October 20, 1997.

/s/ James L. Foreman
DISTRICT JUDGE